(2)

No. 97-1555

Supreme Court, U.S.
FILED
APR 17 1998
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ARKANSAS CHRISTIAN EDUCATORS ASSOCIATION
AND
JAMES L. PARSONS, INDIVIDUALLY AND
AS PRESIDENT OF ACEA,

Petitioners,

v.

OZARKS UNLIMITED RESOURCES COOPERATIVE
AND
DR. LEON MCLEAN, INDIVIDUALLY AND
AS DIRECTOR OF OUR,

Respondents,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Frank B. Newell
Counsel of Record
for Respondents
101 S. Spring Street, Suite 300
Little Rock, AR 72201
(501) 376-2981

Dan F. Bufford
Stephanie G. Holder
101 S. Spring St.
Suite 300
Little Rock, AR 72201
(501) 376-2981

31 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether Ozark Unlimited Resources Cooperative, a multi-district educational cooperative in Arkansas, was properly deemed to be an arm of the State entitled to Eleventh Amendment immunity where the State Board of Education has the authority to establish and dissolve the cooperative, has ultimate control over policies and procedures of the cooperative, and provides for its basic operating funding, and where any judgment rendered against the cooperative must necessarily be satisfied from the state treasury.

II. Whether the actions of Steve Brewer, the Teacher Coordinator for OUR, and Dr. Leon McLean, Director of OUR, constituted an express or implied policy of OUR under *Monell v. New York City Department of Social Services* which would subject the Cooperative to liability for the alleged violations of the Petitioners' constitutional rights.

III. Whether Dr. Leon McLean, Director of OUR, was properly granted qualified immunity for his actions in removing Mr. Parsons and the ACEA from a non-public inservice training workshop -- a workshop the Petitioners admittedly had no constitutional right to attend or to speak -- that was being provided to school district teachers and administrators to aid in the implementation of learner outcomes as mandated by the Arkansas General Assembly, that was not designed for the discussion or debate on the efficacy of such standards, and in which the Petitioners proceeded to disseminate and distribute literature which denounced the implementation of those standards.

IV. Whether an inservice training workshop, not open to the general public, designed solely to aid school district teachers and administrators in the implementation of certain state mandated regulations, and to which only selective access was granted to certain related organizations, was properly deemed a non-public forum in which content-based restrictions on speech could be imposed.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW I

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

No compelling reason exists to review this case 4

The District Court and the Eighth Circuit correctly applied the appropriate legal standards 4

CONCLUSION 24

TABLE OF CITED AUTHORITIES

U.S. Supreme Court cases

Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788 (1985) 14-15, 19, 20, 21

Edelman v. Jordan, 415 U.S. 651 (1974) 6

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 14

Hazelwood Sch. Distr. v. Kuhlmeier, 484 U.S. 260 (1987) . . 19

Lake Country Estates, Inc. v. Tahoe Reg. Planning Agency, 440 U.S. 391 (1979) 6

Lincoln County v. Luning, 133 U.S. 529 (1890) 6

Malley v. Briggs, 475 U.S. 335 (1986) 14

Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978) . . . . . i, 10, 11, 12

Parker v. Levy, 417 U.S. 733 (1974) 22

Pembaur v. Cincinatti, 475 U.S. 469 (1986) 11, 12

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) 6

Perry Educ. Ass'n v. Perry Local Educator's Ass'n., 460 U.S. 37 (1983) 15, 17-19, 20, 21

Regents of the University of California v. Doe, --- U.S. ---, 117 S.Ct. 900 (1997) 10

Widmar v. Vincent, 454 U.S. 263 (1981) 19

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) . . 6

Quern v. Jordan, 440 U.S. 332 (1979) 6

Federal cases

Batra v. Bd. of Regents of University of Nebraska, 79 F.3d 717 (8th Cir. 1996) 16

Bills v. Dahm, 32 F.3d 333 (8th Cir. 1989) 14

Coriz v. Martinez, 915 F.2d 1469 (10th Cir. 1990) 14

Fields v. Omaha, 810 F.2d 830 (8th Cir. 1987) 14

Garmon v. Foust, 741 F.2d 1069 (8th Cir. 1984) 14

Hadley v. North Arkansas Community Technical College, 76 F.3d 1437 (8th Cir. 1996) 6, 8

Hopkins v. Saunders, 93 F.3d 522 (8th Cir. 1996) 9

Loza v. Lynch, 625 F.Supp. 850 (D. Conn. 1986) 12

McGautha v. Jackson County, 36 F.3d 53 (8th Cir. 1994) . . 12

M.N.C. of Hinesville v. U.S. Dep't of Defense, 791 F.2d 1466 (11th Cir. 1986) 21

Persons for Free Speech at SAC v. United States Air Force, 675 F.2d 1010 (8th Cir. 1982) 22-23

Schlothauer v. Robinson, 757 F.2d 196 (8th Cir. 1985) 14

Strauss v. City of Chicago, 760 F.2d 765 (7th Cir. 1985) . . . 12

U.S. v. Blumberg, 961 F.2d 787 (8th Cir. 1992) 16

Warren v. Lincoln, 816 F.2d 1254 (8th Cir. 1987) 14

Statutes, Regulations and Rules

42 U.S.C. §1983 ..... 2, 6

Act 236 of 1991 1

Act 349 of 1991 ..... 7, 8

Act 1194 of 1995 9

Ark. Code Ann. §6-13-1001 et seq. 7

Ark. Code Ann. §6-13-1002 7

Ark. Code Ann. §6-13-1003 7

Ark. Code Ann. §6-13-1005 7

Ark. Code Ann. §6-13-1006 7

Ark. Code Ann. §6-13-1013 7

Ark. Code Ann. §6-13-1019 ..... 8, 9

Ark. Code Ann. §6-13-1020 ..... 7, 12

Ark. Code Ann. §6-13-1021 7

Ark. Code Ann. §6-13-1022 7

Ark. Code Ann. §6-15-1001 et seq. 1

Ark. Code Ann. §6-17-1113 9

Supreme Court Rule 10 4

STATEMENT OF THE CASE

Ozark Unlimited Resources Cooperative (OUR) is an Arkansas educational cooperative, consisting of twenty-one member school districts in seven counties. It was established pursuant to the Education Service Cooperative Act of 1985, for the purpose of assisting its member districts to (1) meet or exceed accreditation standards and equalize educational opportunities, (2) effectively use educational resources among the member districts, and (3) promote coordination of between school districts and the Department of Education in order to provide services which are consistent with the needs identified by the school districts and the educational priorities of the state as established by the General Assembly and the State Board of Education. One of the services provided by OUR for the benefit of its member school districts is an annual inservice training workshop.

The 1995 inservice training workshop held on August 16 and 17 of 1995, presented by OUR was designed solely to prepare administrators and teachers who work within the Coop for the implementation of state mandated learner outcomes.[1] The workshop was not designed to allow participants to debate political, philosophical, or other adversarial issues; rather, it was designed to provide a positive, motivational "jump-start" for the coming school year. The programs for the workshop were distributed only to the teachers and administrators in the member school districts for the purpose of pre-registration for the 300 plus inservice sessions offered by the workshop. No advertisements or invitations were provided to the general public, and the general public did not attend.

Prior to the workshop being held, Jim Parsons, the State Director of the Arkansas Christian Educators Association (ACEA)

---

[1] Act 236 of 1991 mandated the implementation of learner outcomes in Arkansas public schools. See Ark. Code Ann. § 6-15-1001 et seq.

-- an organization for "Christian and conservative educators" -- requested and received permission from the OUR Teacher Center Coordinator, Steve Brewer, to set up a booth at the workshop. It was being held at the North Arkansas Community Technical College in Harrison, Arkansas.[2] Mr. Parsons and the ACEA was allowed to maintain a booth at the inservice workshop on August 16, 1995.

However, it was subsequently determined during the first day of the workshop that the literature being distributed by Mr. Parsons and the ACEA, among other things, denounced the use of learner outcomes as an educational standard. Dr. Leon McLean, Director of OUR, received some complaints on ACEA, during the first day of the workshop, read the literature, and determined that it was inappropriate for dissemination at the inservice workshop which, again, was designed to, specifically, promote the implementation of learner outcomes as mandated by the Arkansas General Assembly. As a result, Mr. Parsons and the ACEA were asked to leave the exhibit hall at the end of the first day. Neither Mr. Parsons nor the ACEA was prevented or restricted from distributing their literature, pamphlets, or leaflets outside the exhibit hall, or, otherwise, soliciting workshop participants for membership in the ACEA.

As a result of their removal from the inservice training workshop, Mr. Parsons and the ACEA filed suit in federal court pursuant to 42 U.S.C. § 1983 on the allegations that Dr. Leon McLean and OUR violated their First Amendment right to freedom

---

[2] Parsons and the ACEA stated in their Petition that they were "invited" to attend the workshop. This is a blatant misrepresentation of the facts. Parsons and the ACEA were not "invited" to attend the workshop by the Coop as they assert in their Statement of the Facts. Rather, they requested permission to attend the workshop and based upon what later proved to be false representations by Mr. Parsons about the ACEA, they were subsequently permitted to attend. Once the truth about the organization became known to the Coop on the first day of the workshop, that *permission* was later rescinded. Thus, the insinuation that OUR and Dr. McLean requested their presence is simply incorrect.

of speech and the Equal Protection Clause of the Fourteenth Amendment. Following the completion of some discovery, Dr. McLean and OUR filed a Motion for Summary Judgment asserting that (1) the Coop was entitled to Eleventh Amendment immunity; (2) that there was no evidence that Dr. McLean was acting under a custom or policy of the Coop; (3) that Dr. McLean was entitled to qualified immunity for his actions; and (4) that no constitutional violation occurred. The District Court granted the summary judgment motion on all four grounds. Parsons and the ACEA moved for reconsideration of the decision which was denied. An appeal of the District Court's opinion was taken to the Eighth Circuit Court of Appeals. After a review of the record and the submissions by the parties, a three-judge panel at the Eighth Circuit affirmed the District Court's order on Summary Judgment. Petitioners did not even seek a rehearing en banc prior to the filing of this Petition.

REASONS FOR DENYING THE WRIT

NO COMPELLING REASON EXISTS TO REVIEW THIS CASE

Review of a matter on a writ of certiorari is not a matter of right, but of judicial discretion. Supreme Court Rule 10. Thus, in order for this Court to grant a Petition for a Writ of Certiorari, the court must have a compelling reason to do so, such as a conflict among the decisions of the circuit courts. Supreme Court Rule 10(a). On the other hand, a petition for a writ of certiorari is rarely granted when the asserted error consists merely of erroneous factual findings or the misapplication of a properly stated rule of law. Supreme Court Rule 10.

The present case, clearly, falls within the latter category. Petitioners have not alleged any conflict among the circuits or any other compelling reason for granting a writ of certiorari. Rather, as shown more fully below, the Petitioners' assertions of error relate solely to the allegedly erroneous factual findings of the court and its allegedly improper application of law -- both categories which this Court has cautioned will not support the granting of a writ of certiorari.

THE DISTRICT COURT AND THE EIGHTH CIRCUIT CORRECTLY APPLIED THE APPROPRIATE LEGAL STANDARDS

Petitioners first contend that the District Court, in granting summary judgment in this case, erroneously considered all factual disputes in the light most favorable to the Respondents and improperly resolved all doubts in their favor. See Petition, p. 7-8. This assertion is blatantly inaccurate. The District Court correctly set forth the standard of review for summary judgments in its opinion. See Appendix to Petition, A-13 - A-15. In fact, the court expressly noted the harshness of the remedy and that all inferences were to be resolved in favor of the non-moving party. A-14, A-15. Yet, Petitioners now assert that the District Court misapplied this correctly-stated standard of review when it granted summary

judgment in this case. Not only is this assertion incorrect, it is also precisely the type of situation this Court has stated is not appropriate for review by writ of certiorari.

Furthermore, this argument was never presented to the Eighth Circuit for review. The only argument for reversal submitted to the Eighth Circuit related to the alleged "genuine issues of material fact." Nowhere in the appellate brief is it argued that the District Court improperly viewed the facts in a light most favorable to the Defendants. Petitioners' attempt to reformulate their argument to include this contention is a veiled attempt to somehow create a basis for certiorari in this matter. They should not be allowed to do so.

Finally, the Eighth Circuit was correct in affirming the judgment of the district court granting summary judgment in favor of the Respondents under the facts of this case. Respondents are aware that, ordinarily, a party should not address the merits of the action in response to the petition for writ of certiorari. The Petitioner, however, has deemed it necessary to delve into the merits of the action in its Petition, and the Respondents must, likewise, discuss the merits in order to rebut the allegations contained in the Petition.

I. Whether Ozark Unlimited Resources Cooperative, a multi-district educational cooperative in Arkansas , was properly deemed to be an arm of the State entitled to Eleventh Amendment immunity where the State Board of Education has the authority to establish and dissolve the cooperative, has ultimate control over policies and procedures of the cooperative, provides for its basic operating funding, and where any judgment rendered against the cooperative must necessarily be satisfied from the state treasury.

The Eleventh Amendment immunizes an unconsenting State from damage actions brought in federal court, except when

Congress has abrogated that immunity for a particular federal cause of action. *Hadley v. North Arkansas Community Technical College*, 76 F.3d 1437 (8th Cir. 1996); *See generally, Edelman v. Jordan*, 415 U.S. 651 (1974). Section 1983 does not override Eleventh Amendment immunity. *Hadley, supra*; *See also Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), construing *Quern v. Jordan*, 440 U.S. 332 (1979). However, it is not necessary that the State itself be named as a party to the action in order for the Eleventh Amendment to apply. A state agency or official may invoke the State's Eleventh Amendment immunity if immunity will "protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 123 n. 34 (1984) *quoting Lake Country Estates, Inc. v. Tahoe Reg. Planning Agency*, 440 U.S. 391, 401 (1979). On the other hand, Eleventh Amendment immunity does not extend to political subdivisions created by the State, such as counties and cities. *Hadley, supra*; *See Lincoln County v. Luning*, 133 U.S. 529 (1890). Thus, the issue before the Court was whether OUR should be treated as an arm of the state entitled to Eleventh Amendment immunity or whether it should be treated as a political subdivision to which the Eleventh Amendment immunity would not apply.

Petitioners, however, contend that the District Court and the Eighth Circuit erred in finding that OUR was "both financially and institutionally an arm of the state" and that "any damage award to [them] would inevitably be paid from the state treasury." Appendix to Petition, A-19. The facts relied upon by Petitioners to support this position have been stated in such a way as to distort the true nature of the educational cooperative in Arkansas.[3] As stated

---

[3] Petitioners, also, submitted facts which were not presented to the trial court in their Response opposing summary judgment. Rather, these facts were improperly submitted to the court in their motion for reconsideration. They should not have been considered by the District Court then, and they are not properly before the Court now.

earlier, while Respondents are aware that this Brief is not the appropriate forum to address the issues raised on the merits, the Respondents feel compelled to rebut the Petitioner's misconceptions regarding the true nature of the educational cooperative in Arkansas.

A. STATE VS. LOCAL CONTROL

First, the State has complete control over the establishment of educational cooperatives. OUR was established pursuant to Act 349 of 1991, now codified at Ark. Code Ann. § 6-13-1001 et seq. Act 349 provides that the State Board of Education has the sole authority to establish and dissolve such educational cooperatives. Ark. Code Ann. §§ 6-13-1002 & -1022 (Repl. 1993). That Agency, also, has the sole authority to establish, adjust, and alter the boundaries of the cooperatives. Ark. Code Ann. §§ 6-13-1003 & -1005 (Repl. 1993). Additionally, the cooperatives are subject to annual audits by the Legislative Joint Auditing Committee, as well as an audit every five years by the State Board of Education. Ark. Code Ann. §§ 6-13-1020 & -1021 (Rep. 1993).

Moreover, Arkansas statutes dictate how an educational cooperative must be governed. Arkansas law mandates that cooperatives established under the Act be governed by the board of directors. Ark. Code Ann. § 6-13-1006 (Repl. 1993). It further dictates who may serve on the board of directors, the number of times the board must meet, as well as the board's responsibilities. Id. Unlike school districts, the cooperative's board of directors are not elected officials, (Affidavit of Dr. Leon McLean) and it is the State Board of Education which develops the policies. rules, and regulations of the cooperatives. Ark. Code Ann. § 6-13-1013 (Repl. 1993). Any other policies or procedures developed by the cooperatives must be filed with and submitted to the State Board of Education for approval, along with reports of receipts and expenditures. Ark. Code Ann. § 6-13-1020 (Repl. 1993). Again, unlike school districts, the local citizens of the State who reside within the boundaries of the cooperative do not have any control

over the actions or decisions of the cooperative or its Board. Affidavit of Dr. Leon McLean.

Petitioners, however, argue that the amount of local control which may be exerted over the cooperatives prohibits OUR from being considered a state agency for purposes of the Eleventh Amendment. However, the fact that some local control or interest exists does not necessarily remove the cloak of Eleventh Amendment immunity. *Hadley v. North Arkansas Community Technical College*, 76 F.3d 1437 (8th Cir. 1996) (noting that the community college system at issue blended state and local interests and authorities and stating that nothing precludes a State from delivering regional or even local governmental services through the arm of the State). In any event, the District Court reviewed all the evidence presented and found that OUR was substantially controlled by the State.

B. FUNDING

Secondly, and most importantly, any judgment rendered against the cooperative would have to be satisfied out of the state treasury. Petitioners urge that because the cooperative receives some local and federal funding, immunity is not proper. However, the fact that OUR may receive some outside funding for its programs does not automatically remove OUR from the protection of the Eleventh Amendment. Rather, the District Court correctly looked to the type of funding received by OUR and the purpose for which those funds are designated.

Section 16-13-1019 mandates that the state provide the funds necessary to support the basic structure of the educational service cooperatives established under Act 349 of 1991. Dr. McLean corroborated this in his affidavit to the District Court by stating that "[v]irtually all the maintenance and operations funding [base funding] for OUR is from state funding; categorical and restricted federal and state grants are primarily utilized for program funding". In fact, funding for all cooperatives for 1995, including

OUR, was by a line item appropriation in Act 1194 of 1995. See affidavit of Dr. McLean.

While it is true that OUR does receive some additional local and federal funding for its programs, those funds could not be used to satisfy any judgment. State law provides that categorical state and federal grants may be assigned to the cooperative under conditions set by the State Board of Education. Ark. Code Ann. § 6-13-1019(d) (Repl. 1993). Those funds, however, are primarily utilized for "specific" program funding, not operations funding, and would be ineligible to satisfy any judgment rendered against the cooperative. In fact, those grants, by law, can be used only for the specific purposes for which they were designated.

Despite Petitioners' assertions to the contrary, any judgment entered against OUR would have to be paid out of those funds appropriated by the State. *See Hopkins v. Saunders*, 93 F.3d 522 (8th Cir. 1996). When all the factors are viewed together, it is clear that the District Court and the Eighth Circuit properly granted summary judgment on this issue.

C. THE AVAILABILITY OF INSURANCE

Petitioner, further, contends that immunity should not have been granted because any judgment rendered against OUR would be covered by insurance. In support of their assertion, Petitioners cite Ark. Code Ann. § 6-17-1113. That statute, by its very language, did not include coverage for educational cooperatives or employees of educational cooperatives in August of 1995. Rather, it clearly applied only to certain enumerated employees of local school districts. Thus, Petitioners' reliance upon this statue is clearly misplaced. Furthermore, in August of 1995, the Department of Education of the State of Arkansas did not provide an actual insurance policy and elected to pursue the other option under the statute of providing a self-funded program which is funded by the state.

In any event, this Court recently rejected the proposition that the determination of whether Eleventh Amendment immunity exists depends upon the "formalistic question of ultimate liability". *Regents of the University of California v. Doe*, --- U.S. ---, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997). The absence or presence of a third party's undertaking to indemnify the agency does not determine whether it is the kind of entity that should be treated as an arm of the State. *Id.* The Eleventh Amendment protects the State from the risk of adverse judgments even though the State may be indemnified by a third party. *Id.* Thus, the availability of insurance or a self-funded program is irrelevant in determining whether OUR is entitled to Eleventh Amendment immunity.

D. PROSPECTIVE AND EQUITABLE RELIEF

Petitioners, however, assert that even if Eleventh Amendment immunity was properly granted, such immunity does not prohibit the grant of equitable and prospective relief. While this is a correct statement of the law and the District Court recognized such a remedy could potentially exist despite its grant of immunity, Petitioners ignore that the District Court, ultimately, ruled that no constitutional violation occurred. If there is no violation, there can be no remedy, legal or equitable.

II. Whether the actions of Steve Brewer, the Teacher Coordinator for OUR, and Dr. Leon McLean, Director of OUR, in removing Petitioners from the inservice training workshop constituted an express or implied policy of OUR under *Monell v. New York City Department of Social Services* which would subject the Cooperative to liability for the alleged violations of the Petitioners' constitutional rights.

Even if it is determined that OUR is not entitled to Eleventh Amendment immunity, Petitioners must still prove that OUR had an unconstitutional custom or policy, either express or implied, which violated their constitutional rights. In their Petition, the Petitioners

assert that the decision to remove them from the inservice training workshop reflected a unwritten policy of the Cooperative to expel anyone with an unacceptable viewpoint. Petition at 14. In their Response to the Motion for Summary Judgment, however, Petitioners argued that no such custom or policy was necessary. It was only *after* the Court granted summary judgment in favor of the Cooperative that the Petitioners attempted to subsequently provide this proof. As this evidence was not before the District Court at the time judgment was entered, it was not considered by the District Court, and it should not be considered in determining whether the judgment was appropriate.

Even if the arguments advanced by the Petitioners can be considered by the Court, Petitioners' theories must fail. In *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978), this Court held that, while a local governmental entity was a "person" subject to suit under the language of 42 U.S.C. §1983, "a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." *Monell*, 436 U.S. at 694. In other words, the governmental unit is only liable where its *custom or policy* inflicted the injury.

Furthermore, in *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), this Court made clear that the policy or custom required under *Monell* must be the policy or custom of the governmental unit itself, adopted by officers authorized to make policy on behalf of the governmental unit, and not that of an individual employee. Although *Pembaur* recognizes that a single decision by a policy maker may be enough for a municipality to be held liable, not every decision by a government officer exposes the local governmental entity to §1983 liability. Such liability only attaches where the decision maker possesses final authority to establish municipal policy. As stated previously, all policies of the cooperative are

established by its Board of Directors and are required by statute to be approved by the State Department of Education. Ark. Code Ann. § 6-13-1020(a)(1) (Repl. 1993). Neither Steve Brewer nor Dr. McLean could exercise final decision making authority and, accordingly, their individual actions cannot be imputed to OUR under *Pembaur*.

In order to establish the "policy or custom" required by *Monell*, a plaintiff, essentially, has two alternatives. The plaintiff can show that an express policy, statute, or rule exists which deprives individuals of their civil rights and show a single unconstitutional application of that rule, or the plaintiff can show evidence of other constitutional violations, separate and apart from those alleged in the complaint, from which a jury could infer the existence of a custom or policy. *Loza v. Lynch*, 625 F. Supp. 850 (D. Conn. 1986). Petitioners do not contend that OUR had an express custom or policy. Rather, they attempt to infer from the actions of Steve Brewer, the teacher coordinator for OUR, and Dr. Leon McLean, the Director of OUR, an implied custom or policy of OUR to violate the First Amendment rights of persons with whom they do not philosophically agree. Such an inference is insufficient. In order to prove a pattern of misconduct, absent an express policy, a plaintiff must show that the misconduct was "pervasive" among the non-policy making employees of the governmental unit, so as to amount to a custom. *McGautha v. Jackson County*, 36 F.3d 53, 56 (8th Cir. 1994). A single isolated incident, like the one allegedly unconstitutional removal of the Petitioners from the inservice training workshop, would, therefore, not be sufficient to hold the cooperative liable. *Strauss v. City of Chicago*, 760 F.2d 765 (7th Cir. 1985).

Petitioners, however, assert that, since Dr. McLean and Steve Brewer had the authority to grant permission and/or remove them from the inservice training workshop, they were somehow converted into final policy makers for the cooperative. This is simply incorrect. For example, teachers clearly have the authority to control the atmosphere and conduct of their classroom. Yet, the

misuse of that authority by a teacher, standing alone, would not subject the school district to liability. Although a teacher may have the authority to control her classroom, she is not necessarily a final policy maker for the school district. Likewise, even if it is determined that Dr. McLean and Steve Brewer had the authority to control access to the conference and that they abused that authority, their alleged misconduct cannot be imputed to the Cooperative. They are not final policy makers of the Cooperative and absolutely no evidence has been presented that they were acting pursuant to any official policy of the Cooperative.

Petitioners, further, contend that Steve Brewer's statement in his deposition regarding whether he would have granted access to the ACEA if he had known of their position is sufficient evidence of an implied policy of the Cooperative in violating First Amendment Rights. Again, Steve Brewer is employed as a Teacher Coordinator for the Cooperative. While he may have had some authority to grant access to third persons to attend the workshop, there is no evidence that he is a final policy maker for the cooperative, and, as a result, his personal opinions cannot be imputed to the Cooperative. Since Petitioners failed to either allege or present facts showing either an express or implied policy of OUR which violated their rights, summary judgment was appropriate for the Cooperative.

III. Whether Dr. Leon McLean, Director of OUR, was properly granted qualified immunity for his actions in removing Mr. Parsons and the ACEA from a non-public inservice training workshop -- a workshop the Petitioners admittedly had no constitutional right to attend or to speak -- that was being provided to school district teachers and administrators to aid in the implementation of learner outcomes as mandated by the Arkansas General Assembly, that was not designed for the discussion or debate on the efficacy of such standards, and in which the Petitioners proceeded to disseminate and distribute literature which denounced the implementation of those standards.

It is well established that a government employee enjoys a qualified immunity from suit under 42 U.S.C. §1983 if he has acted in good faith. See, for example, *Fields v. Omaha*, 810 F.2d 830 (8th Cir. 1987); *Warren v. Lincoln*, 816 F.2d 1254 (8th Cir. 1987). Most cases involving qualified immunity relate to law enforcement activities. However, it is well established that other public employees, such as school district employees, are entitled to the defense of qualified immunity when sued under 42 U.S.C. §1983. See, for example, *Coriz v. Martinez*, 915 F.2d 1469 (10th Cir. 1990) *cert. den.* 499 U.S. 960 (1991). The same treatment should be extended to employees of an educational cooperative.

Qualified immunity grants immunity from suit under §1983 unless the public employee's conduct violated clearly established law. *Schlothauer v. Robinson*, 757 F.2d 196 (8th Cir. 1985); *Garmon v. Foust*, 741 F.2d 1069 (8th Cir. 1984). To be held clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Bills v. Dahm*, 32 F.3d 333, 335 (8th Cir. 1989). The standard in determining whether a clearly established right has been violated is an objective, not a subjective, standard. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Under the *Harlow* standard, an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner. *Malley v. Briggs*, 475 U.S. 335 (1986). This standard is, specifically, designed to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. *Id.*

Petitioners assert that the Eighth Circuit and the District Court erred in granting Dr. McLean qualified immunity because there is no more clearly established right under federal law than the right of free speech. While Respondents do not contest the Petitioners assertion that the opinions expressed by the ACEA at the inservice training workshop regarding religion and the effectiveness of outcome-based education are political views entitled to protection under the First Amendment, even protected speech is not equally permissible in all places and at all times. *Cornelius v. NAACP Legal*

Defense and Education Fund, Inc., 473 U.S. 788, 799, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). Nor does the First Amendment guarantee unlimited access to government-owned property for the purpose of expression. *See generally, Perry Educ. Ass'n v. Perry Local Educator's Ass'n.*, 460 U.S. 37 (1983).

It is clear from the undisputed facts that the activities and literature of the ACEA were incompatible with the intended purpose of the workshop, i.e. learner outcome education. The ACEA is opposed to the learner outcome standards mandated by the Arkansas legislature, and it distributed its literature espousing its opposition to such mandates at the workshop. One of the primary purposes of the workshop was to aid teachers and administrators in the implementation of those standards which they were, by law, required to implement. A debate on the efficacy of such standards was clearly inappropriate in this type of forum. The facts in this case give rise to a unique circumstance -- on the one hand there is an inservice training workshop designed to aid and train school employees in the understanding and execution of mandated public policy and, on the other hand, there is a request by the opposition to that public policy to criticize and distribute literature in opposition to that policy during the workshop. To grant such a request would clearly lead to confusion and disruption in the training process. As such, a reasonable official, like Dr. McLean, who is responsible for the operation and success of the workshop, could reasonably understand that placing restrictions on such speech were warranted in this situation.

In fact, Mr. Parsons and the ACEA acknowledged in their Response to the Summary Judgment Motion that they did not have a constitutional right to attend and speak at the inservice training workshop. They even conceded that OUR and Dr. McLean had the right to limit or preclude their participation in the workshop. Yet, they somehow contend that Dr. McLean should have known that he could not exercise his right to limit or preclude the ACEA's participation in the workshop without violating their constitutional rights. Certainly, under the facts presented, the contours of the

Petitioners' rights to distribute literature at the workshop was not so clearly established that a reasonable official would understand that he was violating that right. Moreover, Dr. McLean acted only after he, in good faith, determined that the literature and activities of the ACEA and Mr. Parsons were being disruptive to the workshop.

Petitioners, additionally, argue that Dr. McLean was not entitled to qualified immunity for the alleged violation of the Equal Protection Clause. Petitioners argument on this count must, also, fail. Unless a classification is based on a suspect class or interferes with a fundamental right, the classification is presumed constitutional. *U.S. v. Blumberg*, 961 F.2d 787 (8th Cir. 1992). Parsons and the ACEA have never asserted that they are members of a suspect class, and they conceded that they do not have a fundamental right of access to the inservice training workshop. Therefore, the "classification" imposed by the Cooperative is presumed constitutional and will only result in a violation of the Equal Protection Clause if it is arbitrary and irrational. *See Batra v. Bd. of Regents of University of Nebraska*, 79 F.3d 717 (8th Cir. 1996). Dr. McLean's removal of the Petitioners from the inservice training workshop was neither arbitrary nor irrational. Again, the inservice training workshop was designed solely for training teachers, the discussion of topics related to the implementation of state-mandated educational standards, and to provide a positive "jump start" for the new school year. The workshop was not designed to debate the validity of outcome based education or the necessity of religion in schools. Parsons and the ACEA were distributing literature on these topics and some participants expressed concern over the organization's inclusion in the workshop. Thus, there was a rational and legitimate reason for the removal of the Petitioners from the inservice training workshop. Moreover, as stated above, the contours of the Petitioners' rights to distribute literature at the workshop was not so clearly established that a reasonable official would understand that he would be violating the equal protection clause by removing them from the workshop. Accordingly, qualified immunity was properly granted.

Finally, Petitioners allude to an alleged violation of their right to the Free Exercise of Religion in the heading for Issue II. They do not, however, provide any supporting argument for their claim that such a violation occurred anywhere in the Petition. While Petitioners noted in their brief to the Eighth Circuit that Dr. McLean's actions violated their freedom of religion, no such claim was made to the District Court. Therefore, this new theory should not be the basis for granting a writ of certiorari.

IV. Whether an inservice training workshop, not open to the general public, designed solely to aid school district teachers and administrators in the implementation of certain state mandated regulations, and to which only selective access was granted to certain related organizations, was properly deemed a non-public forum in which content-based restrictions on speech could be imposed.

Petitioners, further, assert that certiorari should be granted to review the District Court's determination that the inservice training workshop was a nonpublic forum. The District Court's analysis on this issue was correct, and, therefore, certiorari is not appropriate.

This Court in *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983) gave a detailed description of the three different categories of fora:

> In places which by long tradition or government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity have been sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the public, and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions. In

these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling government interest, and leave open ample alternative channels of communication.

A second category consists of public property which the State has opened for use by the public as a place for expressive activity. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.

Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned by the government". In addition to time, place and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated on several occasions, "'"[t]he State, no less than a private owner of property has power to preserve the property under

its control for the use for which it is lawfully dedicated.""""

Id. at 45-46. (internal citations omitted).

A. PUBLIC FORUM

As described above, public forums are those areas "which by long tradition or government fiat have been devoted to assembly and debate". *Id.* Examples of such are public streets and parks. Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788 (1985). Schools, however, are not considered traditional public forums in which outside visitors may freely espouse their views. *See Widmar v. Vincent*, 454 U.S. 263, 267 n. 5 (1981); *Perry, supra* at 47. The public schools do not possess all the attributes of streets parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hazelwood Sch. Distr. v. Kuhlmeier*, 484 U.S. 260 (1987). Hence, school facilities may be deemed public forums ***only if school authorities have created a public forum***.

Here, the inservice training workshop was not a traditional public forum. Like a school, a cooperative and its inservice training workshop is not one of the places that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, or discussing public questions." Rather, the purpose of the inservice training program was to aid teachers and administrators in the implementation of the goals and requirements set forth by the Arkansas General Assembly and to ready them for the coming school year. It was not advertised to the public, it was not open to the public nor designed for debate of political, philosophical, or, otherwise, adversarial issues.

B. LIMITED PUBLIC FORUM

In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. *Cornelius, supra* at 802. The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse. *Id.* The courts will not find that a public forum has been created in the clear face of contrary intent, nor will the courts infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity. *Id.* at 803.

OUR never intended to create a public forum on August 16, 1995, for the expression of ideas or debate of the issue. As stated above, the purpose of the workshop was to aid teachers and administrators in the implementation of learner outcomes as mandated by the Arkansas General Assembly, not to debate the efficacy of those ideas or the advancement of religious views. Nor was any evidence presented that OUR opened its training workshop for indiscriminate use by the general public for the expression of ideas. No invitations to the general public were sent, nor did the general public attend. Some educational exhibitors were allowed, but they were required to obtain permission in order to appear and distribute and display their materials. Instead, the only evidence presented was that OUR granted permission to some other outside organizations. Moreover, implicit in the fact that permission had to be obtained before an individual or group could appear at the workshop is that permission could be withdrawn if it was determined that the actions of the group or individual was inconsistent with the purposes of the function. This type of selective access does not transform government property into a public forum. *See Perry, supra* at 47. Nor do the facts suggest that OUR was motivated by a desire to provide an open forum for the expression of ideas. Rather, the purpose and intent of the training program was

to provide services to teachers and administrators consistent with the educational priorities of the State -- the implementation of outcome-based education -- not to open a forum for public discourse on the propriety of outcome-based education or the dissemination of religious materials.

The government does not create a limited public forum by permitting limited discourse. *Perry, supra* at 267. It can only do so by intentionally opening a nontraditional forum for public discourse. OUR did not do that in this instance. OUR did not show by either policy or practice any intent to open the training program to indiscriminate use by the public. Instead, it reserved the forum for its intended purpose -- an in-house service workshop for aiding its teachers and administrators in the implementation of the mandated outcome-based education model.

C. NONPUBLIC FORUM

As the inservice training workshop is neither a traditional public forum nor a limited public forum, it falls under the category of a nonpublic forum. As a nonpublic forum, OUR had no "constitutional obligation *per se* to let any organization have access to its facilities." *Perry, supra* at 48. Once speech enters the realm of nonpublic forums, the government's power over its regulation increases dramatically. *M.N.C. of Hinesville v. U.S. Dep't of Defense*, 791 F.2d 1466 (11th Cir. 1986). Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. *Cornelius, supra* at 806. These distinctions may be impermissible in a public forum to activities compatible with the intended purpose of the property. *Perry, supra* at 49. The touchstone is whether they are reasonable in light of the purpose served by the forum at issue.

It is clear from the undisputed facts that the activities and literature of the ACEA were incompatible with the intended purpose of the workshop. The workshop was designed to aid school district

teachers and administrators in the implementation of learner outcome standards mandated by the Arkansas General Assembly, not to debate or discuss the efficacy of such standards. The ACEA is, and was, opposed to those learner outcome standards and distributed literature espousing its opposition to such standards at the workshop -- an activity which was completely incompatible with the purpose of the workshop. Thus, Dr. McLean's actions in removing the Petitioners were reasonable in light of the purposes for which the forum was designed, and no constitutional violation occurred when he did so.

In *Persons for Free Speech at SAC v. United States Air Force*, 675 F.2d 1010 (8th Cir. 1982), the Eighth Circuit held that the fact that a base commander allowed other civilian organizations to obtain booths at an open house, while denying the Plaintiff's request for a booth, did not amount to the denial of the Plaintiff's constitutional rights. In that case, Plaintiffs were an organization which denounced the military and promoted peace. In finding that no public forum was created and in finding that no constitutional deprivation occurred, the Eighth Circuit, quoting *Parker v. Levy*, 417 U.S. 733, 751 (1974), stated:

> The military establishment is subject to the control of the civilian Commander in Chief and the civilian department heads under him, and its function is to carry out the policies made by those civilian superiors. Civilians, our President, and Congress make the "ideological" decisions for the military. Where the military stands today may be an ideological controversy and even more so where the military will stand tomorrow. *But the debate on such controversies is for civilian forums not military bases* . . . To the extent that the Air Force's display of its current state in terms of weapons systems and aircraft reflects and "ideology", it is an ideology which is developed and controlled under our Constitution by civilians. It is our elected officials

> who develop the "ideology" which the Air Force is *required* to carry out. The decisions on the military's current and future state do not historically or traditionally occur on military bases. . . . The argument that the military has abandoned its ideological neutrality is based on the false premise that the military itself can pick and choose under our Constitution the "ideology" it wishes to carry out.

Id. at 1017 (emphasis added)(internal citations ommitted).

Likewise, the outcome-based education standards the ACEA sought to criticize at the workshop were mandated by the Arkansas General Assembly. Dr. McLean and the other teachers and administrators were required *by law* to carry out or implement those standards in the member school districts. Thus, a debate on the merits or efficacy of such standards would be appropriate in a forum of some other type. It was certainly not appropriate at a workshop designed to help those administrators and teachers to understand and implement those standards.

CONCLUSION

There is no compelling reason for this court to grant this Petition for Writ of Certiorari. Petitioners have merely asserted that the District Court and the Eighth Circuit made certain factual errors and that the Courts misapplied a properly stated rule of law. This Court has indicated that neither of these reasons would support the granting of a writ of certiorari. For these reasons and the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

Frank B. Newell
Counsel of Record for Respondents
101 S. Spring St., Suite 300
Little Rock, AR 72201-2488
(501) 376 -2981

Dan F. Bufford
Stephanie G. Holder
101 S. Spring St., Suite 300
Little Rock, AR 72201-2488
(501) 376 -2981